

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
SARAVIA, et al., : Docket #12cv7310
Plaintiffs, :
- against - :
2799 BROADWAY GROCERY, LLC, et al., : New York, New York
Defendants. : September 5, 2014
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PROCEEDINGS BEFORE
THE HONORABLE PAUL A. CROTTY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

THE CLERK: Your Honor, this is the matter of Gustavo Saravia, et al., versus 2799 Broadway Grocery, LLC, docket number 12cv7310. Counsel for plaintiff please state your appearance.

MR. RICK OSTROVE: For the plaintiffs, Rick Ostrove and Dan Markowitz from Leeds Brown Law.

HONORABLE PAUL A. CROTTY (THE COURT): Okay.

MR. JOSEPH LABUDA: And good morning, Your Honor, Joseph Labuda, Milman Labuda Law Group for the defendants.

THE COURT: Okay. All right, do you want to bring me up to date?

MR. OSTROVE: Where we are is that class certification occurred in May, we subsequently held a settlement conference which was unsuccessful. And we have not sent out class notification yet because we're waiting for the class list still from the defendants. And other than that we think we're, we need a pretrial order and we're ready to try the case, Your Honor.

THE COURT: Okay. Mr. Labuda, what about the information needed for the class notice?

MR. LABUDA: We can provide that within, I think we have basically provided all the names and addresses of everybody because this has been a collective action as well, so we sent out, we provided the list for the names and

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2 addresses of everybody. But we can provide the list just to
3 make sure that everybody is on that one within the next two
4 weeks.

5 THE COURT: Okay. How does that suit you,
6 plaintiffs?

7 MR. OSTROVE: That's fine.

8 THE COURT: Okay. And then what has to be done
9 after you, Mr. Labuda, do you have something to say?

10 MR. LABUDA: Well I was going to say I think the
11 next step would be for us to probably take a small sampling of
12 the class members in terms of depositions maybe some document
13 demands from a sampling of individuals.

14 THE COURT: Okay, that seems reasonable, does it
15 seem reasonable to the plaintiffs?

16 MR. OSTROVE: My understanding was that discovery
17 was closed at this point. I mean he had an opportunity, we had
18 54 opt-in plaintiffs as it was and he didn't even take all the
19 depositions that were authorized by Your Honor back then,
20 we're kind of looking to move forward with this.

21 THE COURT: Well it won't take that long and my
22 recollection is that the -- I reread my order on the class,
23 one of the objections was it was a little bit tardy, you said,
24 oh, no, it can be done at any time. So within, let's see,
25 you're going to provide the names for the class action notice,

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today is the 5th, you'll do that by when, Mr. Labuda?

MR. LABUDA: By the 19th.

THE COURT: The 19th, okay. And then how long will it take you to get out the notice?

MR. OSTROVE: A few weeks. We're going to have a claims administrator send it out so I'd have to check with them. Typically it takes two, three weeks.

THE COURT: And after that how many depositions do you want, Mr. Labuda?

MR. LABUDA: I'd probably say like three.

THE COURT: That won't take long at all, will it?

MR. LABUDA: No, it won't take too long. You know, the only issue is we also have to get, you know, documents from those individuals as well.

THE COURT: What documents?

MR. LABUDA: Well in this case there's an issue with respect to the hours that they were working and I know Your Honor had bifurcated the class in terms of liability and damages.

THE COURT: Yeah.

MR. LABUDA: But we need to get the, we'd need to get let's say any type of payroll records from those individuals, if they have like calendars, in this case I know that the plaintiffs, the class members have produced certain

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2 like time chits saying that they don't match up with the hours
3 that they were actually paid for. So those are I think the
4 main documents that we're going to necessarily need in this
5 case, it's more so the time chits if they have any.

6 THE COURT: What do you have to say?

7 MR. OSTROVE: I'm a bit -- are you looking to take
8 discovery from people that didn't opt in in 216(B) but now are
9 becoming class members since it was certified?

10 MR. LABUDA: You know, Your Honor, as you may
11 recall, as you noted, we did object on the basis of time
12 limits that, in fact, discovery was over. Obviously that was,
13 you know, the Court ruled that they were allowed to have a
14 class. Now we're talking about a whole different animal here
15 in terms of collective action versus class action and we're
16 entitled to take some class discovery. I mean class --
17 discovery had ended previously, you know, we didn't think that
18 it was appropriate to have a class, you guys, the plaintiffs
19 decided to move for a class action after discovery was over,
20 we believe that we have the right to do that. And I think the
21 Court has indicated that in fact we can take some class
22 discovery of a few individuals.

23 THE COURT: No, but it has to be reasonable in terms
24 of scope and duration and recognition of the fact that you did
25 have an opportunity to take, there is a significant overlap

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between the collective action and the class action, correct? I mean different theories of liability, that's really what the class action is for.

MR. LABUDA: Different theories of liability and --

THE COURT: But the hours, the people are essentially the same, the hours are essentially the same?

MR. LABUDA: Not necessarily, but the other thing too is that you're talking about a particular, whenever there's a class action, there's a much, much broader breadth of liability that exists, you know, with the collective actions people have to, if they're going to participate in the case they have to actually go in and testify about those particular situations. And this, in this case with respect to at least part of the claim, you know, the individuals, the class members, they don't have to participate at all, it's just a matter of if there is determined liability it's just a matter of arithmetic of what these particular people are owed. And so the potential monetary damages that my client might have to pay has just been exponentially increased. And so we decided at the collective action, you know what, we're not going to, we don't believe that a lot of these people are going to ever participate, we've got limited resources, and we took plenty of depositions during that time, we didn't take all of them, I think the Court had allowed us to take ten and

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2 we took less than that but now that the stakes are a lot
3 higher, so to speak, especially since the fact that the
4 plaintiffs had made the demand after discovery, or the motion
5 after discovery was closed, for them to now say that somehow
6 we're not entitled to take any class discoveries, quite
7 frankly it's preposterous and I think we have the right to do
8 it. And so --

9 THE COURT: I understand all that, Mr. Labuda, but
10 I'm not sure what to take?

11 MR. LABUDA: All I'm saying is I said we take three
12 depositions of class members, which I think is more than
13 reasonable here, and then we we'd also propound document
14 demands on three individuals as well in terms of any documents
15 that they have to support the position. I mean in this case
16 you've got an issue of one, the hours that they worked, the
17 class is saying that they worked more hours than they were
18 paid for. And I mentioned there were these chits that came out
19 of the POS system and the plaintiffs have produced, you know,
20 a few of these chits to indicate that the hours don't jive
21 with the pay that they got. So we want to see whether or not
22 any of these sampled class members have any chits, any payroll
23 records, any diaries, anything like that that indicate the
24 hours. The other issue has to do with whether or not the shift
25 leaders were, in fact, "employers," and shouldn't have been

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participating in the tip. And so we'd want to depose them on that issue as well and see if they have any documentation, any write-ups that they received from shift leaders or anything like that.

THE COURT: Do you want to say anything from the plaintiff?

MR. OSTROVE: So, Your Honor, I do think that Mr. Labuda did say one thing very accurately and that's that class members are not required to participate in these kind of proceedings. Like the opt in plaintiffs are different in the federal action in the 216(B) because they opted in, and the other class members are the new class members since discovery period ended, there is no authority to force them to like really do anything with the case to put in documentation, to be deposed. Like anyone that he would want documentation from would be from the original 216(B) opt-ins and they've already given all their documents and he's already had an opportunity to depose all these people. So I'm just not clear, other than basically trying a second bite at the apple, why does --

THE COURT: It's not a second bite at the apple, I mean he hasn't had any discovery on the class action.

MR. OSTROVE: He has.

THE COURT: Pardon?

MR. OSTROVE: He has gotten documentation --

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THE COURT: On collective action, he's had discovery on the collective action but not on the class action, right?

MR. OSTROVE: He has but what he's asking for is the same exact thing that he asked for in the collective action.

MR. LABUDA: I don't see what the difference is.

MR. OSTROVE: Exactly what he described is exactly what he got in the collective action because he asked for it. All he had to do was ask for it, which he did, and we gave it to him.

THE COURT: Mr. Labuda, I want you to put down what your discovery is, write it out and you meet with the plaintiffs, and if you can't agree on what the discovery is going to be, come back, and you'll provide the detailed discovery. The notice, you're going to get the information from the plaintiffs about the names of the class action by the 19th, you're going to send that out by when?

MR. OSTROVE: As soon as the claims administrator can get it out --

THE COURT: Well give me a date so we have a control date, will you? I mean be flexible about it. How many weeks?

MR. OSTROVE: I would say three weeks.

THE COURT: Three weeks, so that would bring us to the 16th, the 26th, the 3rd, and then the 10th. Do you think you can do it by the 10th, that would give you from the 19th to the

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2 10th of --

3 MR. OSTROVE: Yeah, that should be no problem.

4 THE COURT: Okay.

5 MR. OSTROVE: Your Honor, and with regard to
6 discovery, we really didn't give it much, we didn't give it
7 any thought because we assumed it was closed, but to the
8 extent that it's reopening for a limited purpose now I would
9 just like us also to have the opportunity to think about if
10 there's something extra that we wanted --

11 THE COURT: Yeah.

12 MR. OSTROVE: And then we can confer with counsel as
13 well.

14 THE COURT: Correct. So you agree upon an amended
15 civil case management plan, provide for discovery in light of
16 my decision on class action. And it's got to be very limited,
17 it's got to be focused, it's got to be prompt, but within that
18 limitation I'm going to allow it to go forward. And after
19 that discovery will be finished and you'll be ready for trial.
20 When would you be ready for trial?

21 MR. OSTROVE: We would be ready for trial as soon as
22 discovery is over from the plaintiffs' perspective.

23 THE COURT: All right. So all right, Mr. Labuda, we
24 have a schedule for the dissemination of the information
25 needed for promulgation of the class action notice, and you

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come up with your discovery plan, you work on that with the plaintiffs' firm, and if you can't reach agreement come back. But I would think that this would take, we ought to be thinking about a trial sometime in early 2015. What does our schedule look like, Marlon?

THE CLERK: As of now we have a two to three week criminal trial scheduled to commence on January the 12th, Your Honor. Besides that we have nothing else on the calendar in 2015.

THE COURT: Okay, what are your dates? Will you check them?

MR. LABUDA: Do you want us to confer with, it may be easier in terms of conferring case management plan and then proposing a date to the Court after we've spoken to clients.

THE COURT: Well I'd like to get some sense of what your availability is.

MR. LABUDA: Okay.

THE COURT: I can give you the best information on my availability. What do we have after January, Marlon?

MR. LABUDA: When is that criminal trial starting?

THE COURT: January 8th. Is it January 8th, no?

THE CLERK: January 12th.

THE COURT: January 12th.

THE CLERK: Two to three weeks.

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MR. LABUDA: So basically January is out.

THE COURT: So Mr. Labuda, let me take up your suggestion, why don't you mark this tentatively on everybody's calendar for February?

MR. LABUDA: Okay.

MR. OSTROVE: I have a March 2nd trial, Your Honor, so if we could do it in early February that would be --

THE COURT: All right, that's control purposes. And Mr. Labuda, you should get back to me within two or three weeks on the discovery schedule.

MR. LABUDA: Sure.

THE COURT: If you are able to work it out just submit it, if you are not able to work it out we'll have another conference.

MR. LABUDA: That's fine, so we'll either submit a joint civil case management plan for the class --

THE COURT: Or if you can't do that --

MR. LABUDA: Or we'll right a letter to Your Honor saying --

THE COURT: And I'll resolve it, okay.

MR. LABUDA: But we're looking at a February trial.

THE COURT: Correct.

MR. LABUDA: Early February trial.

THE COURT: Correct.

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MR. LABUDA: Okay.

MR. OSTROVE: And, Your Honor, could I just clarify one other potential problem that I anticipate?

THE COURT: Go ahead.

MR. OSTROVE: In terms of the depositions that he wants to take, I mean we don't have control over these class members, we don't even know who many of them are, I would just like it clear that they would be responsible for subpoenaing and serving their documents requests on the individual along with the subpoena.

MR. LABUDA: Normal, at least my normal procedure is to send that to you. I mean quite frankly I think if sent a subpoena to them I'd be violating the rules of professional conduct because I'm contacting somebody that's represented by them. So I think in any situation I've never sent a subpoena to a class member, I mean they represent all these individuals. So I --

THE COURT: I think he's right on that.

MR. LABUDA: So I'd be loathe to do that.

THE COURT: But you can identify, how are you going to identify the three --

MR. LABUDA: We'd basically consult with our client and determine who we think is best to depose.

THE COURT: Right, then you'll talk about it with

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the plaintiffs, let's see where we go from there.

MR. LABUDA: Right, I mean I have run into this situation before where you have, we've selected somebody and they can't locate them, and what we've done is just substituted somebody else in.

THE COURT: All right, that's what we'll do. Thank you.

MR. LABUDA: Okay. All right, thank you, Your Honor.

THE COURT: Maybe I'll see you in a couple of weeks.

MR. LABUDA: Hopefully not.

MR. OSTROVE: Your Honor, if we, just again, I know this is, I could see it, I'm just trying, I know it's going to be a problem, because they're going to notify us of someone, we're going to reach out, the person may or may not get back to us or may get back to us and say I'm not coming, I don't want to deal with this. And then the next question is going to be are we obligated to subpoena our own class member for him to depose them or can he just serve a subpoena and he can get who he can get?

THE COURT: Well why don't we take it one step at a time? I mean you are going to represent the class, correct?

MR. OSTROVE: Yes.

THE COURT: I mean I appointed you as class counsel,

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correct?

MR. OSTROVE: That's correct, Your Honor.

THE COURT: Right, so you do have an obligation to the -- right?

MR. OSTROVE: I don't have a problem executing that, but I do suspect in these class actions sometimes people don't want to participate, and I, you know, I didn't know unless you're a class rep that you would be obligated to be, appear for depositions.

THE COURT: Well what do you think a class rep is supposed to do?

MR. OSTROVE: Well I'm saying other than the class reps. Because the class reps we have no problems with, we'll produce --

THE COURT: No, no, but you're representing the class, I mean what do you think your obligations are as the attorney for the class?

MR. OSTROVE: I do believe it's to represent them as adequately as possible --

THE COURT: Yeah, correct.

MR. OSTROVE: If a class member refuses to participate, then I don't know what the obligation --

THE COURT: Well then I don't know either, we'll find out together.

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MR. OSTROVE: Okay, fair enough, Judge.

THE COURT: Thank you.

MR. OSTROVE: Thank you.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Saravia, et al. v. 2799 Broadway Grocery LLC, et al., Docket #12cv7310, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Date: October 27, 2014